IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
May 18, 2004 Session

STATE OF TENNESSEE v. DAVID SCARBROUGH

Appeal from the Criminal Court for Knox County
No. 62279B Ray L. Jenkins, Judge

No. E2003-02850-CCA-R9-CD - Filed October 11, 2004

The defendant, David Scarbrough, was convicted of two counts of first degree felony murder, two counts of theft, and aggravated burglary and sentenced to a term of life imprisonment with the possibility of parole for each of the murders, six years for the aggravated burglary, and eleven months, twenty-nine days for each of the thefts, with the sentences to be served consecutively. On direct appeal, this court affirmed the aggravated burglary and theft convictions but reversed the felony murder convictions because the trial court had not instructed the jury as to facilitation of felony murder. See State v. David Leon Scarbrough, No. E1998-00931-CCA-R3-CD, 2001 WL 775603 (Tenn. Crim. App. July 11, 2001), perm. to appeal denied (Tenn. Jan. 7, 2002). On remand and before the start of the second trial, the trial court, applying the doctrine of the law of the case, granted the State's motion to prevent the defendant from contesting his conviction for aggravated burglary; and the defendant was granted permission to file this interlocutory appeal pursuant to Rule 9, Tenn. R. App. P., asserting that the trial court's order impinged on his rights to a jury trial and to present evidence in his defense. Following our review, we reverse the order of the trial court.

Tenn. R. App. P. 9 Interlocutory Appeal; Judgment of the Criminal Court Reversed and Remanded

ALAN E. GLENN, J., delivered the opinion of the court, in which GARY R. WADE, P.J., and JOE G. RILEY, J., joined.

Leslie M. Jeffress, Knoxville, Tennessee, for the appellant, David Scarbrough.

Paul G. Summers, Attorney General and Reporter; Brent C. Cherry, Assistant Attorney General; Randall E. Nichols, District Attorney General; and William H. Crabtree, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

FACTS

In the direct appeal, this court set out the facts which were the basis for the defendant's convictions:

> Shortly before 5:00 p.m. on February 4, 1995, Lieutenant Darrell Johnson of the Knox County Sheriff's Department was directed to investigate a double homicide at the residence of the victims, Lester and Carol Dotts, on Russfield Drive in Knox County. When he arrived at the scene, Lt. Johnson observed multiple gunshot wounds to each of the bodies. The screen door to the porch had been cut, a window pane had been broken, and the interior of the house had been ransacked. There were six .9 mm rounds recovered in the bedroom where Mr. Dotts's body was discovered. Lt. Johnson testified that one .9 mm round was recovered from Mr. Dotts's body, two from the bed rail and mattress, and two from underneath the carpet. There was a .9 mm round at the foot of the bed and a .38 caliber bullet on the floor. In the den area where Mrs. Dotts's body was found, police recovered a .9 mm round from the hallway, one from the bathroom scales, and one from the hall closet. The last .9 mm round, which traveled the length of the house, was found in the exercise/sewing room. Police also recovered nine shell casings from a .9 mm semiautomatic weapon. Lt. Johnson testified that six shell casings were found near Mrs. Dotts's body and three were found near Mr. Dotts's body. During the course of the investigation, Johnson came into contact with 13 year old Harley Watts. Watts, who had been arrested for stealing cars, gave a statement to police which implicated the defendant and Thomas Gagne in the murders.
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> At trial, Watts, who by then had pled guilty in juvenile court to burglary and two counts of murder, testified that he was "riding around" Knoxville late at night with Gagne and the defendant, looking to break into parked automobiles. He recalled that Gagne drove to a "rich" neighborhood, stated his intention to burglarize one of the homes, and parked his vehicle at a dead-end street. He stated that Gagne and the defendant left the vehicle and he remained inside. When they hurriedly returned to the car about 30 minutes later, the defendant was carrying a .9 mm semiautomatic pistol, which he handed to Gagne as they drove away. Gagne then remarked, "somebody came out on [me] and [I] started shooting." According to Watts, Gagne later threw something out the window.

Dr. Sandra K. Elkins, Knox County Medical Examiner, testified that Mr. Dotts sustained five gunshot wounds and Mrs. Dotts was shot at least seven times. It was her opinion that both were alive when their wounds were inflicted.

Robert Edward Brykalski, the victims' son-in-law, testified that when he inventoried the victims' house after the crime, he discovered that several items were missing. Mr. Dotts's billfold, Mrs. Dotts's purse, and some 200 to 300 blank checks could not be found. Police later recovered the billfold and purse a short distance from the victims' house. Brykalski also testified that the victims were planning to go out to a restaurant on the night before their bodies were discovered, but had not left the house by 6:30 p.m.

John Raymond Jacobs, a rebuttal witness for the state, testified that he worked with the defendant at U-Haul truck rentals in the summer of 1996. He claimed that sometime after the murders, he and some other employees were telling "war stories" when the defendant admitted to killing a couple in West Knoxville.

Some five days after the crime, police arrested the defendant and charged him with possession of a .9 mm gun. While the weapon, which was tested by the FBI, was not identified as the gun used in the homicides, the defendant, after consulting with his attorney at that time, Jeff Hagood, provided the police with an incriminating statement.

In his initial statement to law enforcement officials, the defendant acknowledged that he was with Gagne and Watts on the night of the murders. He stated that Gagne drove to the victims' neighborhood in order to "pick up some stuff" for his father. The defendant, who said he was smoking marijuana with Gagne at the time, speculated that they were looking for drugs. He claimed that Gagne, who had a nickel-plated .9 mm gun between the seats, stopped the car near the victims' residence and turned off the lights. The defendant stated that he and Watts remained in the vehicle while Gagne stepped outside and looked around for about five minutes. He described Watts as the "front watchman" who stayed in the car. While acknowledging that he and Gagne then walked to the rear of the victims' house, the defendant maintained that he stayed outside the residence in order to "watch" the backyard. He contended that he did not see how Gagne gained entry. The defendant recalled that some 15 minutes later, he heard a gunshot and "took off running" to the car.

He suspected that Gagne had been shot. The defendant told police that he heard more gunshots as he ran toward the car, where he sat for "a minute." Gagne, he claimed, was right behind. They drove away without turning on the lights. The defendant recalled that Gagne remarked, "I had to do it." According to the defendant, Gagne drove Watts to his residence, removed the license tag from the car, and, presumably, added another in its place. In a second statement, the defendant admitted that he was in possession of the .9 mm gun when he left the vehicle. He claimed, however, that he gave the weapon to Gagne before they reached the victims' house.

At trial, the defendant denied any participation in the crime. He testified that he was pressured to give his statements to police because attorney Hagood had informed him that he would not be charged with murder if he cooperated. He explained that he had learned the details he reported to the police from Watts's statement and from newspaper articles. He testified that on the night of the murders, he and Kasey Keirsey, his girlfriend, were visiting his cousin, Michelle Bizak, and her husband Phillip. The defendant contended that he arrived at the Bizaks' house at about 8:00 p.m. and stayed until about 10:30 p.m. He claimed that he met Watts for the first time four days later.

Ms. Keirsey testified that she and the defendant had visited the Bizaks, but she could not remember the date. On cross-examination, however, she acknowledged that she could not have been with the defendant on the night of the murders because a calendar that she kept at that time indicated that she had gone to a school basketball game with two friends.

Christy Ledford, one of Ms. Keirsey's friends, confirmed that the two had attended a school basketball game together on the night of the murder, February 3, 1995. She testified that she remembered the date because it was "Flannel Night" during the school's Spirit Week.

Both Phillip and Michelle Bizak testified that they remembered Ms. Keirsey and the defendant visiting their home. Neither could recall if the visit occurred on February 3, a Friday night, or February 4, a Saturday night.

The jury returned verdicts of guilt. Afterward, the trial court denied a motion for new trial and the defendant filed a notice of appeal. Eleven months later, the defendant petitioned the trial court

> for a writ of error coram nobis based upon the statement of Robert Manning, a Tennessee inmate, who confessed to the burglary and murder of the victims. In his statement, Manning also implicated Eric Steyer, a Michigan inmate. At the hearing, however, Manning declined to answer any questions concerning the crimes. Steyer, who was also called as a witness, testified that he had never committed a criminal offense with Manning. Shannon Langdon, Steyer's wife, testified that Steyer had informed her that he and Manning did burglarize and murder the victims. Steyer denied having made the statement. The trial court denied the writ of error coram nobis and the defendant appealed.

Id. at **1-3 (footnote omitted).

On direct appeal, this court upheld the aggravated burglary and theft convictions but reversed the felony murder convictions because the jury had not been instructed as to the lesser-included offense of facilitation of first degree murder. Id. at *15. In addition, we affirmed the trial court's dismissal of the coram nobis claim.

Before the trial court and on appeal, the State argued that the doctrine of collateral estoppel prevented the defendant from contesting his commission of the burglary and theft offenses and that, because these convictions had become final, the law of the case doctrine prevented his "revisiting" them. The defendant disputed both of these contentions.

In its written order, following the hearing on the State's motion, the trial court, while not explicitly rejecting the State's collateral estoppel claims, grounded its ruling on the law of the case in concluding that the defendant could not contest at the retrial his burglary conviction, from the first trial, which had been affirmed on appeal:

> Defendant appealed a conviction for double felony murder together with a conviction for the underlying felony, burglary. The murder convictions were reversed and remanded for retrial for the Trial Court's omission to instruct the jury on the lesser included offense of facilitation to commit felony murder. The conviction of the underlying felony, burglary, was affirmed and has become final.
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> The question presented: the underlying felony, having been proven, affirmed and became final, is the State required to offer proof beyond a reasonable doubt of the defendant's guilt of that felony in a retrial of the felony murder? In the opinion of this Court the answer is "No". . . .
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> Law of Case:

> Tennessee law is contra to defendant's position. See State v. Carter, Tenn. Crim. App., February 8, 2002, citing State v. Jefferson, 31 S.W.3d 558, Tenn., 2000.
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> The Federal system has considered this question only on two occasions, on the intermediate appellate level.
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> The Third Circuit and the Ninth Circuit have reached opposite results while examining the proposition under an estoppel theory and, of course, until the U.S. Supreme Court unravels this, the Federal stance remains in limbo. These decisions are persuasive only and not controlling. See Pena-Cabanillas v. United States of America, 394 F.2d 785 and United States of America v. Colacurcio, 514 F.2d 1.
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> The Court is satisfied to rest this decision upon Tennessee's settled rulings of "Law of the Case" as above.
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> Therefore, the State may rely upon the previous conviction of burglary in defendant's retrial.

This order grants the State's motion solely upon application of the law of the case. However, since both parties argue on appeal as to whether either collateral estoppel or law of the case prevents the defendant from contesting at his second trial the burglary conviction from his first, we will review both of these doctrines.

ANALYSIS

The differences in the two doctrines were explained in Brett T. Parks, McDonald's Corp. v. Hawkins and the "Law of the Case" Doctrine in Arkansas, 50 Ark. L. Rev. 127 (1997):

> The law of the case and collateral estoppel are different in that collateral estoppel prevents the relitigation of issues in successive suits between the same parties; the law of the case prevents relitigation of the same issues within successive stages of the same suit. Res judicata differs from the law of the case in that it settles the rights of the parties once the judgment is final. The law of the case does not settle rights; it only settles the law to be applied in determining the rights of the parties. Also, many courts view res judicata as a rule of law, whereas the law of the case is merely a practice to guide the court.

Id. at 131 (footnotes omitted).

However, it has been said that, as to commentators who explain such distinctions, including the authors of Wright, Miller, and Cooper in 18B Federal Practice and Procedure § 4478 (2002), they "appear to take refuge in obscurity in attempting to describe practicable application of the distinction." See State v. Presler, 731 A.2d 699, 704 n.3 (R.I. 1999).

We first will consider the ruling of the trial court as to its application of the law of the case.

I. Law of the Case

The State's motion, resulting in the order which is the basis for this appeal, asked that the defendant "be prohibited from denying or collaterally challenging in any way his convictions for Aggravated Burglary as charged in [the] Fifth Count of the indictment, or Theft of Property as charged in the Sixth Count of the indictment or Theft of Property as charged in the Seventh Count of the indictment," leaving, as the issue in the second trial, "whether [the victims] were killed during the perpetration of the aggravated burglary as charged in the Fifth Count." Ultimately, the court granted this motion, ordering, as we have set out, that "the State may rely upon the previous conviction of burglary in defendant's retrial." However, the ruling did not specify whether the State's relying on this conviction meant that the defendant would not be permitted to "introduc[e] evidence before the jury that he was not present during the burglary." As to the ruling, the defendant suggests on appeal that it "might allow the trial court to instruct the jury as to the existence of the burglary judgment at the end of the trial."[1]

The defendant argues on appeal that this ruling makes "a decision on a matter of law which triggers the 'law of the case' doctrine and then only if the facts at the second trial are substantially the same as those offered in the first trial." Since, according to the defendant, he intends to "put on new evidence [at the second trial] suggesting that a person other than [him] committed the crimes," the trial court, according to this argument, cannot apply the law of the case to prevent his contesting whether he was present when the crimes were committed, but can determine whether it should be applied "only after the trial." The State responds that, applying either the doctrine of collateral estoppel or the law of the case, the defendant "should not be permitted a renewed opportunity to avoid responsibility for" the aggravated burglary. We will review these arguments.

The doctrine of the law of the case permits the foreclosing of argument on an issue that was previously decided in an appeal of the same case. See 3 Wayne R. LaFave et al., Criminal Procedure § 10.6(c) (2d ed. 1999); 5 Am. Jur. 2d Appellate Review § 605 (1995). Our supreme court explained in detail its interpretation of this doctrine in Memphis Publ'g. Co. v. Tennessee Petroleum Underground Storage Tank Bd., 975 S.W.2d 303 (Tenn. 1998):

> The phrase "law of the case" refers to a legal doctrine which

[1]We do not entirely understand this argument, but assume that, while the defendant is suggesting that, at the conclusion of the trial, the court might advise the jury that he previously had been convicted of the burglary which was the predicate offense for the felony murder, he was not waiving his right to object to this instruction.

> generally prohibits reconsideration of issues that have already been decided in a prior appeal of the same case. In other words, under the law of the case doctrine, an appellate court's decision on an issue of law is binding in later trials and appeals of the same case if the facts on the second trial or appeal are substantially the same as the facts in the first trial or appeal. The doctrine applies to issues that were actually before the appellate court in the first appeal and to issues that were necessarily decided by implication. The doctrine does not apply to dicta.
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> The law of the case doctrine is not a constitutional mandate nor a limitation on the power of a court. Rather, it is a longstanding discretionary rule of judicial practice which is based on the common sense recognition that issues previously litigated and decided by a court of competent jurisdiction ordinarily need not be revisited. This rule promotes the finality and efficiency of the judicial process, avoids indefinite relitigation of the same issue, fosters consistent results in the same litigation, and assures the obedience of lower courts to the decisions of appellate courts.
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> Therefore, when an initial appeal results in a remand to the trial court, the decision of the appellate court establishes the law of the case which generally must be followed upon remand by the trial court, and by an appellate court if a second appeal is taken from the judgment of the trial court entered after remand. There are limited circumstances which may justify reconsideration of an issue which was issue decided in a prior appeal: (1) the evidence offered at a trial or hearing after remand was substantially different from the evidence in the initial proceeding; (2) the prior ruling was clearly erroneous and would result in a manifest injustice if allowed to stand; or (3) the prior decision is contrary to a change in the controlling law which has occurred between the first and second appeal.

Id. at 306 (citations omitted).

The trial court's order relies on two decisions of our supreme court. The law of the case doctrine was applied in State v. Jefferson, 31 S.W.3d 558 (Tenn. 2000), after this court had affirmed the defendant's conviction for premeditated murder but remanded the matter for a retrial as to punishment. After the trial court had denied the defendant's motion that he be retried as to guilt or innocence as well, the jury at the retrial sentenced him to life imprisonment. On appeal, this court concluded that the trial court had been bound by our previous opinion affirming the defendant's conviction and remanding the case solely for resentencing. Our supreme court, in its review of the result at retrial, determined that the only exception which might have justified not applying the "law

of the case" from the first appeal was if "'the prior ruling was clearly erroneous and would result in a manifest injustice if allowed to stand.'" Id. at 561 (quoting Memphis Publ'g Co., 975 S.W.2d at 306). The court further determined that the trial court had erred in the first trial by instructing the jury under a statute previously found to be unconstitutional, which should have caused this court to remand for a new trial as to both guilt and punishment. Id. However, since two previous juries had found the defendant guilty of first degree murder, based on "overwhelming proof," the court concluded that no rational jury would convict him of second degree murder, as he argued might have occurred. Id. at 562. Accordingly, since "manifest injustice" would not result from affirming the opinion of this court allowing a retrial only as to punishment, application of the finding of guilt at the first trial, as the law of the case, was appropriate at the retrial. Id.

In State v. Carter, 114 S.W.3d 895 (Tenn. 2003), this court had held in the defendant's first appeal that the trial court had not abused its discretion in admitting photographs of the bodies of the two victims. Although their admissibility subsequently was raised as an issue before our supreme court, it did not address that claim but reversed and remanded for resentencing because the jury had been supplied with incorrect verdict forms. Following a resentencing hearing, the defendant again was sentenced to death. On appeal, this court held that, under the law of the case, the second appeal was governed by our ruling in the first, which had upheld the trial court's admission of the two photographs. Additionally, we concluded that a third photograph, also showing the body of one of the victims, was admissible as evidence of the circumstances of the crimes. The defendant argued, *inter alia*, to our supreme court that an exception to the law of the case doctrine applied because this court had erroneously concluded in his first appeal that the trial court was correct in admitting the first two photographs. However, the supreme court rejected the claim that this court had incorrectly applied the law of the case:

> In the first appeal, this Court neither addressed nor decided by implication the issue of the admission of the photographs. Therefore, the Court of Criminal Appeals properly applied the law of the case doctrine in upholding the trial court's admission of the first two photographs, even though this Court reversed and remanded for a new sentencing hearing on another ground. Cf. Ladd v. Honda Motor Co., 939 S.W.2d 83, 91 (Tenn. Ct. App. 1996) (holding that law of the case doctrine does not apply to intermediate appellate court opinions that have been reversed and vacated). As explained below, Carter has failed to show that the prior ruling of the Court of Criminal Appeals was clearly erroneous. Therefore, the Court of Criminal Appeals did not err in applying the law of the case doctrine to the issue of the admissibility of the first two photographs. Because this Court previously did not consider the admissibility of the photographs and did not decide the issue by implication, the law of the case doctrine does not control our review of the issue.

Id. at 902.

The issue presented by the present appeal is unlike these two cases, both of which were retrials of the charge tried at the first trial. However, in the present appeal, the retrial is not of the burglary, the conviction which was the basis for the trial court's ruling, but of the felony murder, and it is at the retrial of that charge at which the defendant seeks to present evidence that he did not commit the burglary, which is the predicate felony.

As we will explain, courts considering whether a criminal defendant may be collaterally estopped from presenting evidence in a retrial have concluded that such limitations are constitutionally impermissible, except in limited circumstances. Accordingly, because of the constitutional implications of the trial court's order, we must determine whether collateral estoppel could be applied to, in the defendant's words, "prohibit [him] from introducing evidence before the jury that he was not present during the burglary."

II. Collateral Estoppel

Collateral estoppel, also called "issue preclusion," is a doctrine of judicial economy utilized to prevent costly relitigation of the same issues, conserve judicial resources, and encourage reliance on judicial conclusions. See Gibson v. Trant, 58 S.W.3d 103, 113 (Tenn. 2001); Beaty v. McGraw, 15 S.W.3d 819, 824 (Tenn. Ct. App. 1998). It is explained that "[w]hen an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim." Restatement (Second) of Judgments § 27 (1982). It is applied in two situations: "offensive" collateral estoppel, where the plaintiff prevents the defendant from relitigating a previously decided issue, and the converse, "defensive" collateral estoppel, where the defendant prevents the plaintiff from doing so. At common law, both the party seeking estoppel and the estopped party had to have been identical to or in privity with the parties to the original action (known as the "mutuality" requirement), but the United States Supreme Court recognized a growing change by discarding this rule in both offensive and defensive collateral estoppel. Parklane Hosiery Co., Inc. v. Shore, 439 U.S. 322, 327, 99 S. Ct. 645, 649, 58 L. Ed. 2d 552 (1979) (allowing non-mutual offensive collateral estoppel subject to the judge's discretion).

In Beaty, 15 S.W.3d at 827, the court of appeals permitted the use of mutual offensive collateral estoppel, if the party seeking to utilize it demonstrates:

> 1. that the issue sought to be precluded is identical to the issue decided in the earlier suit;
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> 2. that the issue sought to be precluded was actually litigated and decided on its merits in the earlier suit;
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> 3. that the judgment in the earlier suit has become final;
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> 4. that the party against whom collateral estoppel is asserted was a

> party or is in privity with a party to the earlier suit; and
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> 5. that the party against whom collateral estoppel is asserted had a full and fair opportunity in the earlier suit to litigate the issue now sought to be precluded.

Id. at 824-25 (footnotes omitted); see also Restatement (Second) of Judgments §§ 27, 28 (1982). Additionally, the Beaty court endorsed the decision in Parklane that the application of non-mutual offensive collateral estoppel was discretionary with the trial court:

> In exercising its discretion, the trial court may consider (1) whether the plaintiff could have joined the former suit but decided instead to adopt a "wait and see" attitude, (2) whether the defendant had an incentive to defend the former suit vigorously, and (3) whether the judgment on which the plaintiff seeks to rely is itself inconsistent with previous judgments against the defendant.

15 S.W.3d at 826 (citing Parklane, 439 U.S. at 330-31, 99 S. Ct. at 651-52). On the issue of offensive collateral estoppel in criminal cases, no Tennessee court has spoken. Further, the United States Supreme Court has not ruled directly on this issue, although the lower courts have taken certain of its comments, which we will review, as guidance to how it might rule if the question were presented.

In Ashe v. Swenson, 397 U.S. 436, 90 S. Ct. 1189, 25 L. Ed. 2d 469 (1970), the defendant was alleged to have been one of the three or four armed men who robbed six victims as they were playing poker at one of the victim's homes. The defendant was tried and acquitted on one count, as to the robbery of one of the victims, the jury's verdict written as "not guilty due to insufficient evidence." Id. at 462, 90 S. Ct. at 1203. After the State then sought to prosecute him for the robbery of another of the poker players, he filed a motion arguing that his acquittal in the first trial barred his prosecution for robbing any of the other victims. The trial court denied the motion; and, at the subsequent trial, the defendant was convicted. On appeal, the Supreme Court held that because "[t]he single rationally conceivable issue in dispute before the jury was whether the [defendant] had been one of the robbers" and, by its verdict, the jury had determined that he was not, the government was collaterally estopped from prosecuting him for robbing another of the victims. Id. at 445, 90 S. Ct. at 1195. Dissenting from the holding of the lead opinion, Chief Justice Burger theorized that, had the defendant instead been convicted at the first trial, he still could have contested, in a later trial as to another of the victims, that he was one of the robbers:

> [C]ourts that have applied the collateral-estoppel concept to criminal actions would certainly not apply it to both parties, as is true in civil cases, i.e., here, if Ashe had been convicted at the first trial, presumably no court would then hold that he was thereby foreclosed from litigating the identification issue at the second trial.

Id. at 464-65, 90 S. Ct. at 1205 (footnote omitted).

It is this language that has been relied on by a number of those lower courts which concluded that collateral estoppel cannot be applied against a defendant in a criminal case.

First, we will review cases in which collateral estoppel was applied against a criminal defendant. In People v. Ford, 416 P.2d 132, 134 (Cal. 1966), overruled in part by People v. Satchell, 489 P.2d 1361 (Cal. 1971), a case very similar to the present appeal, the defendant was convicted at his initial trial of first degree murder and various other felony offenses including robbery and kidnapping, but the murder conviction was reversed and remanded for a new trial, where the jury found him guilty of felony murder. At that second trial, the judge instructed the jury, according to the defendant's description on appeal, that he previously "had been convicted of robbery, kidnaping and possession of a concealable weapon by an ex-felon, and reserved for the jury only the questions whether the homicide was perpetrated during the commission of any or all of these felonies, and whether he possessed the intent requisite to the various felonies at the time of the commission of the homicide." Id. at 137. However, the California Supreme Court concluded that the trial court had not erred in the second trial by explaining to the jury the fact that the defendant previously had been convicted of robbery, kidnapping and possession of a concealable weapon and instructing that "if they found that defendant's commission of such felonies was conjoined with his commission of the homicide, they might predicate their verdict on the felony-murder rule[.]" Id. at 138. The court then explained the preclusive effect of the convictions from the first trial:

> [W]here a defendant is tried on multiple counts of a single information, each count being considered as a separate and distinct offense, the doctrine of res judicata operates to preclude the relitigation of issues finally determined upon retrial of only one count. (See People v. Beltran, 94 Cal. App. 2d 197, 205, 210 P.2d 238, and cases cited and discussed therein.) It follows that the doctrine of res judicata justifies instructions, where relevant, that a defendant has been found guilty of crimes finally adjudicated which are charged as elements in another charge or charges then in the process of being retried.

Id.

While this holding would certainly be helpful to the State in the present appeal, its continuing validity was questioned in Gutierrez v. Superior Court, 29 Cal. Rptr. 2d 376 (Cal. Ct. App. 1994), wherein the California Court of Appeals concluded that it could not be applied to bar a defendant, convicted of attempted murder, from continuing to argue as to his new indictment for first degree murder, returned after the same victim had died from his earlier wounds, that he had been mistakenly identified in his first trial as the shooter:

> The case at bar is distinguishable from Ford factually and

> procedurally. In Ford it is also significant that the defendant was permitted to, and did, litigate on retrial the issue of whether he had the intent requisite to the various felonies at the time of the commission of the homicide. In fact, there is no indication in Ford that the jury instruction prevented defendant from presenting his defense of diminished capacity or impaired his right to a fair trial on the homicide charge. Thus, Ford is distinguishable from the instant case because petitioner here asserted a mistaken identity defense at his attempted murder trial and would be precluded from presenting this defense under the challenged court order. Moreover, petitioner is not only asserting the claim that the court order constitutes instructional error, but that it impairs his right to jury trial and to the presumption of innocence. These are issues not considered in Ford. A decision is not authority for issues not considered therein. (People v. Lonergan (1990) 219 Cal. App. 3d 82, 93, 267 Cal. Rptr. 887.) It must also be remembered that Ford was decided before Ashe and Simpson [v. Florida, 403 U.S. 384, 91 S. Ct. 1801 (1971)] questioned the ability of the prosecution to invoke collateral estoppel against a criminal defendant.

Id. at 385-86.

Thus, the court majority agreed with Gutierrez's argument that preventing him from again claiming, this time at the retrial, that witnesses had mistakenly identified him as the shooter would deprive him of his "right to present his defense to the jury." Id. at 386. However, the dissent concluded that allowing the defendant to claim in his second trial, as he had done so unsuccessfully in his first, that he was not the shooter might cause "one fair jury to find [the defendant] did shoot [the victim] and another fair jury to find that he did not." Id. at 391. We note that the defendant in the present appeal argued in his first trial, as had Gutierrez, that he was mistakenly identified as being present at the shooting scene and that preventing his arguing this defense at his second trial would impinge on his right to a jury trial and to present evidence in his own defense.

Offensive collateral estoppel has been utilized in criminal cases where the issue involved a status question that could arise in future actions. Hernandez-Uribe v. United States, 515 F.2d 20, 22 (8th Cir. 1975) (preclusive effect given to prior alienage determination); Pena-Cabanillas v. United States, 394 F.2d 785 (9th Cir. 1968) (also involving alienage determination); United States v. Rangel-Perez, 179 F. Supp. 619 (S.D. Cal. 1959) (also an alienage question); People v. Majado, 70 P.2d 1015 (Cal. Dist. Ct. App. 1937) (involving paternity status). However, not all courts have agreed that collateral estoppel is applicable in alienage cases. See United States v. Gallardo-Mendez, 150 F.3d 1240 (10th Cir. 1998) (declining to give preclusive effect to a prior guilty plea in an illegal entry case). As explained by Rangel-Perez, the rationale for applying collateral estoppel in alienage cases is to discourage defendants from committing an offense over and over in hopes of gaining a favorable determination that would foreclose future prosecutions:

> If the issue of alienage were to be tried each time a defendant makes an entry into the United States, after once having been found by judicial determination to be an alien, there would be less to deter future entries than at the present. Even though the present risk of prosecution for illegal entry would remain under 8 U.S.C.A. § 1326, a defendant would have an added incentive to enter again and again, knowing that a trial de novo on the issue of alienage would be forthcoming and that such trial might, on one occasion, result in a favorable verdict. The Government would be estopped by any unfavorable verdict, and accomplishment of the objectives of the immigration laws to discourage and effectively control the already difficult problem of illegal entries into this country would thus be weakened.

179 F. Supp. at 626; see Hernandez-Uribe, 515 F.2d at 21-22; Pena-Cabanillas, 394 F.2d at 787-88.

Additionally, prosecutors have used offensive collateral estoppel to prevent defendants from contesting motions to suppress evidence where judges in prior cases had determined that the evidence was admissible. See, e.g, United States v. Levasseur, 699 F. Supp. 965 (D. Mass.), rev'd on other grounds, 846 F.2d 786 (1st Cir. 1988); State v. Hider, 715 A.2d 942, 945 (Me. 1998) (in second trial, after reversal of first conviction, collateral estoppel doctrine barred defendant from relitigating suppression issue); Richard B. Kennelly, Jr., Precluding the Accused: Offensive Collateral Estoppel in Criminal Cases, 80 Va. L. Rev. 1379, 1384-86 (1994). In fact, our supreme court has suggested that such applications of collateral estoppel might be acceptable: "While collateral estoppel likely could be applied in this circumstance [to give preclusive effect to a prior suppression decision], having thoroughly reviewed the entire record, we choose to address the defendant's contention on its merits." State v. Flake, 114 S.W.3d 487, 507 (Tenn. 2003).

Of the federal circuit courts, the United States Court of Appeals for the Ninth Circuit has allowed offensive collateral estoppel to be utilized the most broadly, not limiting its application to questions as to the defendant's status. For example, as noted by the trial court in the present appeal, in United States v. Colacurcio, 514 F.2d 1, 5-6 (9th Cir. 1975), the court determined that, in a prosecution for tax evasion, the defendant was collaterally estopped from denying that he had received "protection money" to allow illegal bingo games, this fact being "material and relevant" to his earlier conviction for conspiracy to use facilities of interstate commerce to carry on illegal bingo games. Id. at 6-7. However, the Department of Justice appears to have retreated from seeking expanded use of collateral estoppel in the Ninth Circuit against criminal defendants, as had occurred in cases since the Colacurcio decision. In United States v. Arnett, 353 F.3d 765 (9th Cir. 2003), an *en banc* hearing was scheduled to review an earlier determination by a three-judge panel that the defendant was estopped from presenting expert proof, in his subsequent bank robbery trials, that the weapon he had used was an antique, although the jury in the first of his series of bank robbery trials had heard defense expert proof on this claim and rejected it. Shortly before the *en*

banc hearing, the prosecution confessed error as to the issue, federal prosecutors advising the court: "In federal criminal trials, the United States may not use collateral estoppel to establish, as a matter of law, an element of an offense or to conclusively rebut an affirmative defense on which the Government bears the burden of proof beyond a reasonable doubt." Id. at 766. Accepting this changed position, the court then reversed the defendant's bank robbery convictions, where collateral estoppel had been applied as to the weapon used.

Aside from the Ford decision in 1966 affirming application of collateral estoppel in a situation like that of the present appeal, and its use in alienage, status, and suppression cases, courts have not allowed collateral estoppel to be used against a criminal defendant. We will review some of these determinations.

In United States v. Pelullo, 14 F.3d 881, 885 (3rd Cir. 1994), the jury convicted Pelullo of forty-nine counts of wire fraud and one count of racketeering under the Racketeer Influenced and Corrupt Organization ("RICO") Act, 18 U.S.C. § 1962(c). On appeal, all but one of the wire fraud convictions were reversed and, at the second trial, the defendant was convicted of forty-eight counts of wire fraud and one count of RICO. Pelullo, 14 F.3d at 887. Surveying the relatively few cases which had allowed the application of collateral estoppel against a defendant, the court observed that "there has been a strong, unelaborated assumption that the doctrine of collateral estoppel cannot be invoked in criminal cases against the defendant. Judges have stressed in dicta that unlike in civil cases, the collateral estoppel principle should not be applied to both parties in criminal cases." Id. at 891. Rejecting what it described as "public interest concerns," sometimes used to justify the use of collateral estoppel against a defendant, the court concluded that, by its view, such interests "give way to the need of a criminal defendant to defend himself effectively in criminal proceedings." Id. at 893. The court explained that a defendant's constitutional rights would be violated by applying collateral estoppel against him:

> [W]e believe the literal language of the Sixth and Seventh Amendments supports a reading that the right to a jury trial in every criminal prosecution is absolute, even without reference to the then existing common law. Even though the relevant language has not been analyzed by courts or commentators in the context of applying collateral estoppel against a defendant in a criminal case, the actual language provides a textual anchor for the position against applying collateral estoppel against an accused.

Id. at 894.

Subsequently, this holding was relied on in United States v. Gallardo-Mendez, 150 F.3d 1240 (10th Cir. 1998), where the court concluded that a defendant's right to due process meant that "the government may not use a judgment following a plea of guilty to collaterally estop a criminal defendant from relitigating [the issue of alienage] in a subsequent criminal proceeding." Id. at 1246 (footnote omitted).

The few state courts considering this issue have concluded, as well, that collateral estoppel cannot be applied against a criminal defendant. In People v. Goss, 521 N.W.2d 312, 312 (Mich. 1994), the defendant had been convicted of armed robbery and first degree felony murder, and, as in the present appeal, the felony murder conviction was reversed, but the predicate felony was upheld. After remand, the State unsuccessfully moved in the trial court to prevent the defendant from relitigating his armed robbery conviction and then appealed that order denying the motion. Id. at 313. On appeal, the court described the contending theories as to the felony murder:

> The prosecutor's theory of felony murder, once again, is that Goss forced Bonadeo and the Goers brothers to lie down on the ground and then summoned Nelson to kill them. Goss does not deny that someone forced the three men to the ground and held them there until Nelson arrived. Goss argues rather that the witnesses who identified him as the assailant are mistaken.

Id. at 321.

Given the claim of Goss that he had been misidentified as one of the assailants, the lead opinion concluded that, if collateral estoppel were applied by the trial court to his earlier conviction for armed robbery, it would "prevent the second jury from making its own independent evaluation of the armed robbery-element of felony murder, and, therefore, would be the equivalent of partially directing a verdict against him," and would be "an invasion of the fact-finding and ultimate decisional functions of the jury." Id. at 316-17. The concurring opinion disagreed with the view of the lead opinion that applying collateral estoppel against the defendant would violate his right to an impartial jury but agreed that to do so would violate his "due process right to a fair trial" which "outweigh[ed] any interest in judicial economy and efficiency." Id. at 321.

Likewise, in State v. Ingenito, 432 A.2d 912, 913 (N.J. 1981), the defendant, a "self-employed 'flea market dealer,'" earlier had been convicted of the unlicensed transfer of weapons but found not guilty of receiving stolen property. At his subsequent trial on the severed charge of possession of a firearm by a convicted felon, the prosecution relied upon the defendant's stipulation as to two earlier felony convictions to establish that he was a convicted felon and the testimony of the county clerk as to his "recent conviction for the unlicensed transfer of . . . weapons, being the same unlicensed transfer that was the basis for the charge of possession in the ongoing trial." Id. at 913-14. The defendant objected to the use of his "recent conviction" to establish that he possessed firearms, arguing that it amounted to collateral estoppel, which violated his constitutional rights. Id. On appeal, the court explained the rationale for using the clerk's testimony to prove that the defendant possessed firearms:

> The affirmative use of collateral estoppel against a defendant in a criminal prosecution is not predicated upon any constitutional mandate. In this case, to illustrate, the use by the State of the defendant's prior conviction was offered for reasons of convenience

> and expediency. Its approval by the trial court was based narrowly upon notions of judicial economy and the belief that defendant would not be unfairly treated since he had already had the opportunity fully to try the facts in issue in a preceding case and could offer additional proofs in the pending trial.

Id. at 915.

However, the court explained that this procedure violated the defendant's rights:

> Accordingly, we conclude that collateral estoppel, applied affirmatively against a defendant in a criminal prosecution, violates the right to trial by jury in that not only does it seriously hobble the jury in its quest for truth by removing significant facts from the deliberative process, but it constitutes a strong, perhaps irresistible, gravitational pull towards a guilty verdict, which is utterly inconsistent with the requirement that a jury remain free and untrammeled in its deliberations. Hence, the collateral estoppel doctrine, which serves to establish virtually conclusive evidence of a critical element of criminal guilt, cripples the jury in the discharge of its essential responsibilities contrary to the constitutional guarantees of the jury right in a criminal trial.

Id. at 918-19 (footnote omitted).

While the trial court in Ingenito had not prohibited the defendant from presenting evidence to question this previous conviction, the court concluded that providing this opportunity did not avoid the prejudicial effect of proving the conviction solely through the court clerk: "Although the defendant may have been theoretically free to introduce evidence to the contrary, that did not overcome the preclusive and conclusive evidential effects of the prior conviction." Id. at 920.

Some courts and commentators have suggested tests to avoid the potential for abuse or unfairness which might result from applying collateral estoppel as to a criminal defendant. See Richard B. Kennelly, Jr., Precluding the Accused: Offensive Collateral Estoppel in Criminal Cases, 80 Va. L. Rev. 1379, 1384-86 (1994). The test proposed by Kennelly seeks to avoid the problems noticed by the Supreme Court in the Ashe and Simpson dicta, namely the threat of sequential or piecemeal prosecution:

> In an effort to harmonize the competing values of efficiency and accuracy, the summary below briefly identifies the recommended limitations on the availability of issue preclusion of the accused. Preclusion is appropriate where (1) the issue and defendant are both identical to those in the prior proceeding; (2) the

> defendant had a full and fair opportunity to litigate, under the same law and without any fewer procedural opportunities at the first trial; (3) the issue was essential to the prior litigation and was actually litigated (and not resolved in a guilty plea); (4) the charge was a felony and thus sufficiently serious to give the defendant an incentive to litigate vigorously; (5) the sentence was sufficiently serious to provide incentive to appeal; (6) no other inconsistent determinations exist on that issue with that defendant; and (7) the prosecutor did not bring separate prosecutions for strategic or bad faith reasons.

Id. at 1423; see also Levasseur, 699 F. Supp. at 971 (offering a slightly different test).

This test, although intended for determining whether collateral estoppel should be applied offensively in a criminal case, would appear to satisfy, as well, the requirements of Beaty, 58 S.W.3d at 113, as to its use in civil cases.

While cases, in other than the limited areas we have discussed, considering whether collateral estoppel may be applied against a criminal defendant are not numerous, they conclude that its application violates one or more of a defendant's constitutional rights. Several of these cases, as we have noted, have forceful and lengthy dissents, and a few law review articles, as well, disagree with the reasoning of the majority opinions. However, the fact remains that the majority opinions considering this issue conclude, as the defendant in this matter argued, his right to a jury trial and to present evidence in his defense would be violated if he could not attempt to show that he was not present when the burglary was committed. We agree that the defendant's constitutional right to a jury trial would be violated by the trial court's order which, as the parties understand, prevents him from presenting proof which would question the burglary conviction. Thus, just as he cannot be collaterally estopped, for constitutional reasons, from presenting proof as to the burglary conviction, he, likewise, cannot be barred, by application of the law of the case, from doing so. Accordingly, we reverse the order of the trial court and remand with instructions that the defendant not be barred from presenting evidence that he was not present when the crimes occurred. Of course, evidence presented in this regard must meet the admissibility requirements of the Tennessee Rules of Evidence. Further, at the retrial, a determination as to whether the defendant may be impeached with the burglary conviction, which is the predicate felony, should be done in accord with Tennessee Rule of Evidence 609. Although the defendant suggested in his appellate brief that Tennessee law "might allow the trial court to instruct the jury as to the existence of the burglary judgment at the end of the trial," this possible procedure was not briefed by the parties and, therefore, is not before this court.

CONCLUSION

Based on the foregoing authorities and reasoning, we reverse the order of the trial court.

ALAN E. GLENN, JUDGE